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by
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Introduction

The strange workings of the American media are undeniably responsible for shaping the lay person's comprehension of the law. Some may argue that the media is in fact responsible for creating a certain kind of sophistication among the American public regarding "sexier" legal issues. From the confusion of the evening news and courtroom soaps, legal concepts and catchphrases have entered the American psyche: "innocent until proven guilty," "jury of your peers," "the right to remain silent," and so on. Certain assumptions about the law are also communicated by the media and are often adopted by the American people. Perhaps the most basic of these assumptions remains that if you are accused of doing something bad, you can defend yourself in court, and if someone does something bad to you—you sue 'em. Because these assumptions are presented outside of their full context, however, they often lead to misguided ideas concerning a lay person's rights and remedies under a given law.

For instance, it is a basic rule of law that when you affix your signature to a contract, you attest to having read and understood the

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terms. This rule adds little to a story line regarding workplace sexual harassment and may be ignored in a TV drama. Thus, a viewer may become familiar with her statutory right to be free from sexual harassment in the workplace without understanding that the term-of-employment contract she signed will ultimately prevent her from bringing a lawsuit against either her employer or her fellow employees.

The California Court of Appeal case of *24 Hour Fitness, Inc. v. Superior Court*[1] illustrates the tragic results of this type of misunderstanding. Specifically, the plaintiff's view of the facts in *24 Hour Fitness* reveals her naive assumptions about the law. Sierra Munshaw, a young mother who had recently left her job at 24 Hour Fitness, believed her employer essentially forced her to quit by ignoring and/or condoning the inappropriate and offensive behavior[2] of her fellow employees and supervisors.[3] Ms. Munshaw took her grievance to a lawyer who, after a year of aimless negotiations, filed suit against 24 Hour Fitness and the numerous employees who allegedly had harassed and assaulted Ms. Munshaw.[4] The trial court felt that Ms. Munshaw had a case, and denied the defendants' motions for summary judgement.[5] When the defendants appealed the decision, Ms. Munshaw received the news that the defendants would not be required to face her in court.

As part of the paperwork she had filled out to begin working for 24 Hour Fitness, Ms. Munshaw had signed an agreement to arbitrate any dispute arising from her employment.[6] Workplace sexual harassment in violation of California law occurs, by its very nature, during the course of employment. "Harassment of an employee . . . by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective

1. 78 Cal. Rptr. 2d 533 (Ct. App. 1998).

2. Munshaw made allegations against eight defendants in their individual capacities as well as against her employer, 24 Hour Fitness. She claimed that she was repeatedly made the recipient of verbal sexual comments as well as offensive physical touching, all of which she detailed specifically in her complaint. Pl.'s Compl. at 10-11, 24 Hour Fitness, Inc. v. Superior Court, 78 Cal. Rptr. 2d 533 (Ct. App. 1998) (No. 213868) [hereinafter *Complaint*].

3. *Id.* at 6-8.

4. Letter from Henry Lederman, Partner, Littler Mendelson, P.C., to John J. Turri, Counsel for Plaintiff (July 19, 1996).

5. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 535.

6. *Id.* at 535-36.

action."[7] This statute has been amended to impose strict liability on companies when the harassing is done by an agent or supervisor.[8] Consequently, the language of the arbitration clause was interpreted to cover Munshaw's co-workers in their individual status because they were acting within the scope of their employment.[9] The court of appeal reversed the trial court's finding and granted summary judgement for all but one defendant. The appellate court then interpreted a sentence in a letter written by Munshaw's attorney to mean that Munshaw had waived her right to arbitration.[10] Step by step, the court of appeal eliminated Munshaw's possible rights to a remedy for the wrongs she alleged.[11]

Ms. Munshaw had assumed that she had an American's right to a trial. But, in fact, no one can trust that assumption when mandatory pre-dispute arbitration clauses enter the picture. A split between the Ninth Circuit and California state courts in interpreting civil rights statutes serves further to highlight the need for reform in the law regarding mandatory arbitration clauses and employment discrimination claims.[12] Indeed, the contrast between the Ninth Circuit's landmark finding that mandatory arbitration clauses are inapplicable to Title VII claims in *Duffield v. Robertson Stephens & Co.*[13] and the California Court of Appeal's decision to enforce a mandatory arbitration clause in *24 Hour Fitness* is a particularly stark one.

This Note will look at the differences between these two cases and will directly address the consequences of the decision made by the California Court of Appeal in *24 Hour Fitness*. Part I of this Note provides a background regarding mandatory arbitration clauses in employment contracts and examines the Ninth Circuit's rationale in declaring such clauses invalid. Part II advances three criticisms of the California Court of Appeal's decision in *24 Hour Fitness*. First, the court's decision to grant summary judgment to the defendants based

7. CAL. GOV'T CODE § 12940(h)(1) (West 2001).

8. *Id.*

9. *24 Hour Fitness*, 78 Cal. Rptr. at 538-39.

10. *Id.* at 536 ("In a letter sent to Nautilus's counsel after filing the complaint, Munshaw's attorney expressly repudiated the arbitration agreement.").

11. *Id.* at 542 n.12.

12. Note that the split between federal and state law may encourage forum shopping among plaintiffs with mandatory arbitration clauses who are also alleging discrimination, despite the fact that FEHA is generally considered to be a more plaintiff-friendly statute. *E.g.*, Cynthia L. Sands, *Practice Tips: State and Federal Enforcement of Arbitration After* Duffield, 21 L.A. LAW. 18, 24 (1998).

13. 144 F.3d 1182, 1185 (9th Cir. 1998).

on plaintiff's waiver of her arbitration rights impedes fair access to the courts. Second, the third party beneficiary theory which entitled the individual defendants to arbitration rights under the contract, despite the fact that they were not parties to the contract, resulted in an unintended relinquishment of rights that was not within Ms. Munshaw's reasonable expectations. Third, the court did not look at the overall circumstances when assessing the unconscionability of enforcing this clause. Part III argues that the reasoning in *24 Hour Fitness* may severely impede Californians' access to the courts when their civil rights are violated and proposes a compromise between *24 Hour Fitness* and *Duffield* that would better serve the expectations of both parties in disputes over mandatory arbitration clauses in employment contracts.

I. Background to the Decision in *24 Hour Fitness, Inc. v. Superior Court*

A. An Overview of the Use of Mandatory Arbitration Clauses in Employment Contracts

Distinguishing between two different types of arbitration agreements is essential to understanding the court's interpretation of Congress' intent in *Duffield*.[14] One type of arbitration agreement is a post-dispute agreement, which is reached between two parties after the events leading to a claim have already occurred. This type of agreement has many advantages and is less problematic than other types of arbitration agreements.[15] First, it is likely that both parties will have some type of legal counsel once a dispute has arisen and litigation is being contemplated.[16] Second, both parties understand the nature of the claim and can weigh the costs and benefits of litigation versus arbitration.[17] Third, parties are placed into relatively equal bargaining positions because the party wishing to arbitrate and avoid court proceedings must forfeit something to convince the other party to agree.[18]

These elements, which help to guarantee the effectiveness of post-dispute arbitration, are rarely present or contemplated in a

14. *Id.* at 1193.

15. Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 28-29 (1996).

16. *Id.* at 29.

17. *Id.*

18. *Id.*

second type of arbitration clause: the mandatory arbitration agreement.[19] Increasingly popular as a term in employment contracts,[20] the mandatory arbitration clause (also called a pre-dispute arbitration clause or a term-of-employment clause) is often included in an employee handbook or as part of the paperwork a new employee is required to sign in order to begin work.[21] In this type of agreement, the employee waives his rights to litigate future claims against the employer as a condition to obtaining employment.[22] Employers generally are sure to make the terms of a mandatory arbitration clause mutually binding and to use broad language in order to cover any potential claim.[23] Because it is understood that employees seldom read or question the terms of their employment contracts,[24] these clauses are often cross-referenced in several documents that incoming employees must read and sign in order to increase their visibility.[25]

Employers include mandatory arbitration clauses in employment contracts for a variety of reasons. Many employers, for example, view these clauses as merely pre-determined forum selection clauses utilized to avoid time-consuming disputes about the appropriate venue for a trial.[26] Others are concerned about the many types of claims even the most conscientious employer might face in court,[27]

19. *Id.*

20. *See* Gina K. Janeiro, *Balancing Efficiency and Justice: In Support of the Equal Employment Opportunity Commission's Policy Statement Regarding Mandatory Arbitration and Employment Contracts*, 7 AM. U. J. GENDER SOC. POL'Y & L. 125, 127 nn.14-15 (1999) (outlining statistics and studies which illustrate the rising trend of mandatory arbitration clauses as preconditions to employment); *see also* William H. Daughtrey and Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 31 (1998).

21. William M. Howard, *Arbitrating Employment Discrimination Claims: Do You* Really *Have To? Do You* Really *Want To?*, 43 DRAKE L. REV. 255, 283 (1994) (describing different mandatory arbitration agreement policies).

22. *Duffield*, 144 F.3d at 1187.

23. *See* Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, 54 DISP. RESOL. J. 78, 80 (1999).

24. Janeiro, *supra* note 20, at 126.

25. *See* Spelfogel, *supra* note 23, at 80.

26. *See* Howard, *supra* note 21, at 282-83 (describing the elements of effective arbitration clauses).

27. *See, e.g.*, Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 993 (1996) (linking the increasing use of mandatory arbitration clauses to the rising costs of defending employment discrimination claims); Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80

particularly given the large sums that may be awarded to plaintiffs by sympathetic juries.[28]

But mandatory arbitration clauses create a variety of legal problems and public policy concerns. Specifically, the problem with requiring mandatory arbitration as a condition of employment is that the procedures, rights, and remedies available in an arbitration proceeding can differ greatly from those available in a judicial forum.[29] When two parties agree to arbitrate a dispute that has already arisen, it can be assumed that both parties have contemplated the benefits and detriments of arbitration to their particular claims and defenses.[30] However, an employee who has signed on to a pre-dispute agreement has almost certainly not made the same inquiries regarding the differences inherent in the arbitration process. Professor Joseph Grodin attacks the issue:

> Before a dispute arises, it is impossible for a party to assess precisely what is being waived and the probable effect of the waiver—even if his or her attention is focused on the issue. In the employment context this is especially a problem for the employee; while the employer can take into account statistical probabilities affecting all its employees, the employee's ability to predict what may happen to him or her individually is beyond the scope of such analysis.[31]

Concededly, both parties gain some advantages by participating in arbitration; the most commonly noted benefit is that it is more efficient and less costly than litigation.[32] However, the disadvantages to an employee alleging discrimination or harassment are numerous, and often not readily apparent.

These disadvantages include the problem of limited discovery in employment discrimination cases which can be particularly onerous since the burden of proof is on the plaintiff to show discrimination.[33] Another major disadvantage to employee-plaintiffs is the lack of diversity among the arbitrators from which the employee may

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CORNELL L. REV. 1695, 1701-02 (1995) (citing the changing nature of at-will employment as one reason that employers are requiring arbitration clauses as conditions to employment).

28. *See* Spelfogel, *supra* note 23, at 78 (noting that the average jury award in a wrongful termination case is $700,000, with many awards in the millions).

29. Howard, *supra* note 21, at 287-88.

30. Grodin, *supra* note 15, at 29.

31. *Id.*

32. *See* Spelfogel, *supra* note 23, at 78; *but see* Lewton, *supra* note 27, at 996 (concluding that employers may find arbitration just as expensive, time-consuming, and disruptive as litigation due to the current unsettled state of the law).

33. Howard, *supra* note 21, at 287.

choose.[34] Of the 50,000 arbitrators on the American Arbitration Association panels, only 6% are women.[35] Additionally, the results in an arbitration proceeding can be particularly unpredictable because arbitrators are not bound to follow case law.[36] In a worst-case scenario, the limited right to review of an arbitration decision can further prejudice the system against a plaintiff in employment discrimination cases because a plaintiff who receives unfair treatment in arbitration is stuck with the decision made by the biased arbitrator.[37] Recognizing these disadvantages, both the Equal Employment Opportunity Commission and the National Labor Relations Board have announced opposition to mandatory arbitration of employment discrimination claims, specifically when employment is conditioned on the signing of the arbitration clause.[38]

Employers, however, have good reason to favor defending disputes before an arbitrator rather than a jury. The number of employment discrimination cases is twenty-five times greater than the number filed thirty years ago.[39] Plaintiff are estimated to win nearly 70% of the 25,000 wrongful discharge and discrimination cases filed in state and federal courts nationwide, with the average jury award at approximately $700,000.[40] As a consequence, the number of companies choosing to require mandatory arbitration of employee disputes is on the rise.[41] Virtually nothing impedes an employer from making this choice—employers may simply insert clauses into the employment contract, and employees can either take it as a term of employment or find work elsewhere.

B. Statutory Preclusion of Mandatory Arbitration: The Ninth Circuit's Decision in *Duffield v. Robertson Stephens & Co.*

Employers relying on mandatory arbitration clauses in employment contracts to avoid lawsuits by their employees have reason to be concerned over the Ninth Circuit's ruling in *Duffield v. Robertson Stephens & Co.*[42] In that case, the Ninth Circuit found that

34. Victoria J. Craine, Note, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?*, 8 B.U. PUB. INT. L.J. 537, 550 (1999).

35. *Id.*

36. *Id.* at 551.

37. Howard, *supra* note 21, at 287-88.

38. H. WARREN KNIGHT ET AL., CAL. PRAC. GUIDE ALT. DISP. RES. Ch. 5-E, 5:246.5-5:246.10 (1992-1998).

39. Spelfogel, *supra* note 23, at 78.

40. *Id.*

41. Janeiro, *supra* note 20, at 137.

42. 144 F.3d 1182 (9th Cir. 1998).

the 1991 Amendments to the Civil Rights Act prohibits mandatory arbitration of discrimination claims.[43]

The court's finding in *Duffield* was based on language in the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[44] a case traditionally used by courts to enforce agreements to arbitrate discrimination claims.[45] There, the Court ruled that parties should be held to their bargain to arbitrate Title VII claims "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies."[46] If Congress had intended to preclude a waiver of a judicial forum for Title VII claims, it would be apparent in the text of the act, its legislative history, or an inherent conflict between arbitration and the act's underlying purposes.[47] In *Duffield*, the Ninth Circuit found sufficient evidence that Congress had intended to preclude a waiver of these rights to meet the standard outlined in *Gilmer*.[48] In looking at the Civil Rights Act of 1991, the Ninth Circuit determined that Congress had spoken to the issue of alternative dispute resolution, in section 118.[49] Section 118 reads:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolutions including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by this Title.[50]

The *Duffield* court made a connection between the language of section 118 and the overall intention of the 1991 amendments. It noted that the list in section 118 includes only types of alternative dispute resolution agreed to once a dispute has arisen[51] and that Congress' directive was to read Title VII broadly so as to best effectuate its remedial purposes.[52] Moreover, the Act's legislative history revealed Congress' primary intent to strengthen existing protections and remedies available to employees bringing discrimination claims.[53] Because Congress' intent was to make it

43. *Id.* at 1185.
44. 500 U.S. 20 (1991).
45. *Id.* at 27.
46. *Id.* at 26 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
47. *Gilmer*, 500 U.S. at 26.
48. *Duffield*, 144 F.3d at 1195.
49. *Id.* at 1193 n.21.
50. Pub. L. 102-166, § 216, at 97, *reprinted in* notes to 42 U.S.C. §1981.
51. *Duffield*, 144 F.3d at 1193 n.13.
52. *Id.* at 1192.
53. *Id.* at 1193.

easier for plaintiffs to remedy Title VII violations in the courtroom with relaxed standards and allowance for damages,[54] the Ninth Circuit concluded that Congress did not intend to endorse pre-dispute arbitration agreements.[55]

The Ninth Circuit has subsequently been clear about congressional intent as it relates to arbitrating Title VII claims. "Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII and related state statutes."[56] However, despite the Ninth Circuit's determination to impose these types of knowing consent requirements on contracting parties, California state courts have repeatedly denied the need for such requirements.[57]

II. The Effect of Ignoring *Duffield*: Problems with the California Court of Appeal's Decision in *24 Hour Fitness v. Superior Court*

A. Impeding Fair Access to the Courts by Granting Summary Judgment In Lieu of a Motion to Compel

The most important victory for employers in *24 Hour Fitness* was the appellate court's willingness to grant summary judgement based on the existence of a valid agreement to arbitrate while confirming that Ms. Munshaw had waived her right to arbitrate. In a phone interview, Henry Lederman, lead counsel for 24 Hour Fitness, shared his thoughts on his success in *24 Hour Fitness*.[58] Lederman stated that he had successfully argued for summary judgement in similar arbitration cases in Contra Costa and Alameda Counties. Sonoma County Superior Court, where Munshaw filed her complaint, was the first trial court to offer resistance to his persuasive rendering of the decisions in *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*[59] and *Christensen v. Dewor Developments*.[60] Given this resistance,

54. *Id.* at 1191 (citing H.R. Rep. No. 40(I) at 30; H.R. Rep. No. 40(II) at 1-4, 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96).

55. *Id.* at 1193.

56. Lee v. Tech. Integration Group, 82 Cal. Rptr. 2d 387, 390 (Ct. App. 1999) (quoting Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994)).

57. *Id.* at 392.

58. Telephone Interview with Henry Lederman, Partner at Littler Mendelson, P.C., (Feb. 28, 2000) [hereinafter *Interview*].

59. 484 P.2d 1397 (Cal. 1971).

Lederman's client supported the filing of a peremptory writ in an effort to reverse the trial court's decision to deny summary judgement. The appeal proved fruitful; the court of appeal reversed the trial court's denial of summary judgment as to all but one of the defendants. Lederman's client had successfully avoided both a costly trial as well as the potential risks of an arbitration award for the plaintiff, who was found to have repudiated her right to arbitration in an earlier letter to counsel.

When questioned about the massive requests for depublication of 24 Hour Fitness, Lederman speculated that plaintiffs' attorneys felt emboldened by the Ninth Circuit's decision in *Duffield*.[61] Prior to *Duffield*, California courts had consistently enforced mandatory arbitration clauses covering claims arising under California's Fair Employment and Housing Act (FEHA).[62] *Duffield*, however, specifically linked FEHA claims to Title VII claims in finding neither of them subject to pre-dispute arbitration agreements. In a footnote, the Ninth Circuit in *Duffield* indicated that "'because parallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme,' FEHA claims are arbitrable to the same extent as Title VII claims."[63] Nevertheless, three months after the decision in *Duffield* was handed down, *24 Hour Fitness* unequivocally reaffirmed California's position, stating that the decision of the Ninth Circuit was not binding or even persuasive on California state courts. The court of appeal in *24 Hour Fitness* dismissed *Duffield* in a footnote: "We reject Munshaw's suggestion at oral argument that her FEHA claim is rendered nonarbitrable by *Duffield* . . . *Duffield* is not binding on this court."[64]

Instead, most California courts base their findings regarding mandatory arbitration clauses on the language of California Civil Procedure, section 1281. A written agreement to submit a "controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."[65] The provisions within a contract are considered to bind the parties,

60. 661 P.2d 1088 (Cal. 1983).

61. *See supra* text accompanying notes 54-55.

62. Spellman v. Sec., Annuities & Ins. Servs., Inc., 10 Cal. Rptr. 2d 427, 433 (Ct. App. 1992).

63. *Duffield*, 144 F.3d. at 1187 n.3 (quoting Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1303 n.1 (9th Cir. 1994)).

64. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539 n.9.

65. CAL. CIV. PROC. § 1281 (West 1982).

whether or not the agreement was read or understood by a party.[66] In *Prudential Insurance Co. v. Lai*, the Ninth Circuit required that the relinquishment of statutory rights under an arbitration clause be "knowing and voluntary."[67] However, the California courts appeared to reject the "knowing and voluntary" requirement in *Brookwood v. Bank of America*.[68] Moreover, the state's legislative intent in enacting FEHA has never included an intent to preclude waiver of those statutory rights.[69]

The predominant practical impact of *24 Hour Fitness* has been to restrict potential recourse of plaintiffs wishing to dispute the validity of their arbitration clauses.[70] Prior to the decision in *24 Hour Fitness* the common practice of a defense attorney seeking to enforce arbitration clauses in employment contracts was to file a motion to compel arbitration.[71] As discussed above, Henry Lederman pioneered a defense strategy that challenged that scenario.[72] Two California Supreme Court cases were particularly instrumental in forming this strategy. In *Rounds v. Joint Counsel of Teamsters No. 42*, the court affirmed the dismissal of an employer's action against a union when the dispute was covered by a contractual arbitration clause.[73] In *Christensen v. Dewor Developments*, plaintiffs who had filed suit in bad faith were held to have waived their right to contractual arbitration.[74] By combining the holdings in *Rounds* and *Christensen*, Lederman had convinced trial courts in several counties that plaintiffs pursuing litigation despite a valid arbitration clause had waived their right to arbitration, thus entitling the defendant to summary judgment. The trial court in Sonoma County, where Munshaw filed her complaint, was the first court to offer resistance to Lederman's persuasive rendering of the decisions in *Rounds* and

66. Brookwood v. Bank of Am., 53 Cal. Rptr. 2d 515, 520 (Ct. App. 1996) (citing Macaulay v. Norlander, 15 Cal. Rptr. 2d 204, 207 (Ct. App. 1992)).

67. *Prudential*, 42 F.3d at 1305.

68. 53 Cal. Rptr. 2d at 519.

69. Sands, *supra* note 12, at 21-22 (discussing the absence of language regarding arbitration or waiver in the legislative history of FEHA).

70. *Interview*, *supra* note 58.

71. *See, e.g.*, Davis v. Cont'l Airlines, Inc., 69 Cal. Rptr. 2d 79, 81 (Ct. App. 1997); Wilder v. Whittaker Corp., 215 Cal. Rptr. 536, 538 (Ct. App. 1985); Bertrero v. Nat'l Gen. Corp., 529 P.2d 608, 613 (Cal. 1974).

72. *Interview*, *supra* note 58.

73. 484 P.2d 1399, 1404 (Cal. 1971).

74. 661 P.2d 1088, 1094 (Cal. 1983) (holding that plaintiff had waived arbitration when, as a tactic to obtain discovery from defendant, plaintiff filed a complaint and proceeded with pre-trial motions).

Christensen.[75] As a consequence, Lederman's strategy was heard—and adopted—by a California Court of Appeal.

Rounds outlines three courses a defendant might follow when the only issues litigated are covered by the arbitration clause: it can litigate, compel arbitration, or move for summary judgment "on the ground that the plaintiff has failed to exhaust arbitration remedies."[76] The Court in *Christensen* re-affirmed three factors from its decisions in prior caselaw:[77] "The relevant factors include whether the party seeking arbitration (1) has 'previously taken steps inconsistent with an intent to invoke arbitration,' (2) 'has unreasonably delayed in seeking arbitration,' (3) or has acted in 'bad faith' or with 'willful misconduct.'"[78] The court of appeal in *24 Hour Fitness* accepted defense counsel's argument for summary judgement based on *Rounds*.[79] An understanding of the ramifications of its action is found in the court's final footnote: "We recognize the result of our decision here is that Munshaw has no avenue for recourse against Nautilus,[80] Rodriguez, Harmon or Cunningham. This consequence flows from her decision to repudiate the arbitration agreement."[81]

According to Lederman, the effect has definitely been felt by the legal community.[82] Prior to *24 Hour Fitness*, a potential plaintiff who had signed an arbitration clause might pursue a complaint in court and leave arbitration as a fallback remedy. After *24 Hour Fitness*, plaintiffs' attorneys are far less willing to take a chance in court. The

75. Order Den. Mots. for Summ. J. or Summ. Adjudication, 24 Hour Fitness, Inc. v. Superior Court, 78 Cal. Rptr. 2d 533 (Ct. App. 1998) (No. 213868).

76. *Rounds*, 484 P.2d at 1398.

77. *E.g.*, Keating v. Superior Court, 645 P.2d 1192, 1204-1205 (Cal. 1982); Davis v. Blue Cross, 600 P.2d 1060, 1064 (1979).

78. *Keating*, 645 P.2d at 1204 (quoting *Davis*, 600 P.2d at 1064).

79. Note that the court did not reach the question of whether Munshaw had implicitly waived her right to arbitrate by filing suit, because it found that she had expressly repudiated her right to arbitration in a letter from her counsel. The context of the letter makes the so-called repudiation questionable. The letter addresses the deposition of one of the defendants in relation to the facts of *Christensen*, and then states "Here, plaintiffs are knowingly waiving their right to arbitrate, and are not reversing their position." It is unclear from the context of the statement (sandwiched between two comments regarding the plaintiffs in *Christensen*) whether "here" refers to "in *Christensen*" or to the pending case. The use of the plural "plaintiffs" and "their" to refer to the single plaintiff Munshaw makes the repudiating statement even more suspect. However, nowhere in the record does plaintiff attempt to explain or deny the statement made in the December 5, 1996 letter. (Record on file with author).

80. The names "Nautilus" and "24 Hour Fitness" are used interchangeably in the opinions and pleadings. Except for when used in a direct quote, this paper will use "24 Hour Fitness" to refer to the defendant corporation.

81. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 542 n.12.

82. *Interview*, *supra* note 58.

case has clearly strengthened pre-dispute arbitration clauses by making litigation an all-or-nothing proposition for a plaintiff questioning its rights under the arbitration clause.[83]

Because *24 Hour Fitness* involved an express repudiation of the arbitration agreement, it is hard to know for certain whether California courts will find a waiver of arbitration in every case where a party has failed to pursue arbitration before suing. Consistently substituting summary judgement for a motion to compel arbitration would have a harsh effect on plaintiffs, particularly in employment cases where the arbitration clause is part of an adhesion contract.

There is some indication that courts do not intend this effect. An agreement to arbitrate is favored by courts and there exists a heavy burden on the moving party to establish waiver.[84] In general, it is held that the moving party's mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.[85] However, the language and results in *Christensen, Rounds*, and *24 Hour Fitness* have made some plaintiffs unwilling to take that risk.

B. The Right of Non-Signatories to Enforce an Arbitration Clause in an Employment Contract

One of the strangest results of *24 Hour Fitness* was the catch-22 experienced by the plaintiff in her attempts to bring charges in court against her fellow employees. She found that her efforts to improve her chances of success against her employer limited her ability to successfully sue her coworkers. In order to hold the employer strictly liable for sexual harassment damages under FEHA, a plaintiff must show that the harasser was acting in his supervisory capacity.[86] Otherwise, an employer is held to a negligence standard in its liability for employee-employee harassment.[87] Thus, a plaintiff generally benefits from being able to show that it was her supervisors who engaged in the harassing behavior. Accordingly, Munshaw declared in her complaint that each individually named defendant "was acting within the scope of his managerial authority" when the alleged

83. Lederman notes that as far as he is concerned, employees who feel the arbitration agreement they have signed is invalid are entitled to seek declaratory relief without risking a waiver of their right to arbitrate. *Interview*, *supra* note 58.

84. *Davis*, 69 Cal. Rptr. 2d at 82.

85. *Id.* at 83 (following *Keating*, 645 P.2d at 1204).

86. CAL. GOV'T CODE § 12940(h)(1) (West 2001).

87. *Id.*

misconduct took place.[88] Seeking to avoid a strict liability standard, 24 Hour Fitness replied that "the alleged misconduct of Nautilus employees did not occur during or within the scope or course of their employment with Nautilus."[89]

At the trial level, this word play and posturing seemed to be nothing more than everyday trial attorney maneuvers.[90] According to the unpublished Order Denying Motions for Summary Judgment or Summary Adjudication at the trial level of *24 Hour Fitness*, the individual employees' eligibility to demand arbitration of Munshaw's claims against them was a question of fact not covered by the arbitration clause.[91] The trial court determined that there were "issues raised by the complaint and answer that are not covered by the arbitration agreement, nor susceptible to arbitration."[92] Specifically, the court ruled that the questions of whether the individual defendants were employees of 24 Hour Fitness and whether they were acting within the scope of their employment were not covered by the arbitration agreement. Additionally, it stated that the moving parties had not met their burden of showing that all issues raised in the complaint were covered by the arbitration agreement "or that all parties have signed and are bound by the agreement."[93] Consequently, the trial court denied the defendants' motion for summary judgment.

88. *Complaint*, *supra* note 2, at 3-4.

89. Answer of Def. 24 Hour Fitness, Inc., 24 Hour Fitness, Inc. v. Superior Court, 78 Cal. Rptr. 2d 533 (Ct. App. 1998) (No. 213868) [hereinafter *Answer*].

90. Later in the proceedings, the parties switched positions when it became more apparent that employees "acting within the scope of employment" would be protected by the arbitration clause in the contract. Plaintiff attempted to avoid the effect of her original allegations by saying the incidents in the complaint occurred while she was acting within the scope of her employment, but while the defendants were not. Defendants did not retract their original statement, but instead made use of caselaw supporting an employee's ability to benefit from his employer's arbitration agreements and relied on the argument that the language of the arbitration clause required Munshaw to arbitrate any claim arising from her employment. This argument, carried out to its natural conclusion, is ridiculous. For example, defendants suggest that "the language of the agreement . . . is not limited simply to disputes between Nautilus and Munshaw." Rather, the language covers any dispute that arises from Munshaw's employment. Following from this argument is the bizarre consequence that any employee, customer, or stranger from off the street whose conduct resulted in a dispute involving Munshaw would have a right to claim the benefits of the arbitration contract between Munshaw and 24 Hour Fitness.

91. Order Den. Mots. for Summ. J. or Summ. Adjudication at 2, 24 Hour Fitness, Inc. v. Superior Court, 78 Cal. Rptr. 2d 533 (Ct. App. 1998) (No. 213868).

92. *Id.*

93. *Id.*

The court of appeal, however, reversed the trial court's ruling by allowing the employee defendants to rely on allegations in the plaintiff's complaint to form a factual basis for their motion.[94] Because her complaint asserted that each individual defendant was "employed in a position by 24 Hour NAUTILUS [sic] as a manager and an authorized agent... and was acting within the scope of his managerial authority,"[95] the individual defendants were deemed by the court to have met their burden of proving their third party beneficiary status.[96] This ruling was founded on the principle set forth in *Pinewood Investors v. City of Oxnard*[97] which states that parties seeking summary judgment can rely on admissions of material fact made in the opposing party's pleadings.[98] The court found that Munshaw's allegations constituted admissions of fact[99] in the absence of any countervailing evidence.[100]

The inclusion of these allegations in the original complaint seems to be aimed at holding 24 Hour Fitness financially liable for the acts of its "agents and employees."[101] Identical allegations of supervisory capacity appear after the introduction of each individual defendant, giving that section of the complaint the appearance of a boilerplate form for allegations of discrimination and harassment.[102] However, the court of appeal was not required to look at the intention or knowledge of the plaintiff making the allegations.[103] Instead, a defendant is entitled to rely on allegations made in the complaint as statements of fact in a motion for summary judgement.[104]

Having determined that all defendants, with one possible exception,[105] were acting as agents of 24 Hour Fitness, the court of

94. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539-40.
95. *See Complaint, supra* note 2, at 3-5.
96. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539-40.
97. 184 Cal. Rptr. 417 (Ct. App. 1982).
98. *Id.* at 419-20.
99. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539.
100. *See* Golden W. Baseball Co. v. Talley, 284 Cal. Rptr. 53, 60 (Ct. App. 1991).
101. *See id.*
102. *See id.*
103. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539.
104. *See* Pinewood Investors v. City of Oxnard, 184 Cal. Rptr. 417, 420 (Ct. App. 1982).
105. Defendant Hamilton had made admissions, either as answers to interrogatories or in deposition, wherein he admitted that if the harassment did in fact take place at all, it had taken place at his apartment and therefore not within the scope of his employment. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 540. He was the only defendant who did not receive the benefit of the arbitration clause, and, accordingly, summary judgment. *Id.* However, plaintiff's case against Hamilton could not include a sexual harassment claim in his individual capacity. The parties apparently settled.

appeal turned to the California Supreme Court's ruling in *Dryer v. Los Angeles Rams*.[106] In *Dryer*, plaintiff asserted that four individual defendants were not entitled to the benefit of the arbitration clause he had signed with the defendant corporation.[107] However, the plaintiff specifically alleged in his complaint that the defendants were being sued in their capacity as owners, operators, and managing agents of the corporation in question (the Los Angeles Rams).[108] He additionally stated that each of the individual defendants was a party to the contract, and that each breached the contract.[109] From these allegations, the *Dryer* court concluded that "if, as the complaint alleges, the individual defendants, though not signatories, were acting as agents for the Rams, then they are entitled to the benefit of the arbitration provisions."[110] The court referred to other California court cases reflecting the same proposition.[111]

The *Dryer* court appears to stress the importance of the facts of the case to its ruling. It prefaces the discussion of agency with the following statement: "Given the facts and the procedural posture of *this* case, this ruling [of the trial court, denying individual defendants the benefit of arbitration] yields bizarre results."[112] The plaintiff in *Dryer* had made direct reference to specific, determinable facts about the individual defendants' status as "agents" of the signatory to the arbitration clause.[113] He additionally alleged that the individual defendants were parties to the contract and that they breached the contract containing the arbitration clause.[114]

Despite the court of appeal's ruling, the specific facts of *Dryer* are clearly distinguishable from *24 Hour Fitness*. To begin with, the claim[115] in *Dryer* is a breach of contract claim, whereas the centerpiece of *24 Hour Fitness* is sexual harassment.[116] The extent to which these two different claims involve individuals as well as corporations greatly differs, because a sexual harassment case directly implicates the actions of individuals. Furthermore, the two cases are distinguished in the types of proof offered by the parties. In *24 Hour*

106. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539.
107. Dryer v. Los Angeles Rams, 709 P.2d 826, 833-34 (Cal. 1985).
108. *Id.* at 833.
109. *Id.* at 833-34.
110. *Id.* at 834.
111. *See 24 Hour Fitness*, 78 Cal. Rptr. 2d at 539.
112. *Dryer*, 709 P.2d at 833 (emphasis added).
113. *Id.*
114. *Id.* at 833-34.
115. *Id.* at 827.
116. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 536.

Fitness, the plaintiff makes boilerplate assertions about the nature of the individual defendants' agency.[117] At no time does she allege that the individual defendants are parties to the employment contract that was signed by herself and 24 Hour Fitness, or that they breached that contract.[118] Indeed, 24 Hour Fitness specifically states in its answer to Munshaw's complaint, "the alleged misconduct of Nautilus employees did not occur during or within the scope of course of their employment with Nautilus."[119] Although a defendant's allegations are inconsequential to the issue of what the court can consider as fact, the direct rebuttal of Munshaw's proposition serves to distinguish the facts of this case from the undisputed agency of the defendants in *Dryer*.[120]

Other strong arguments for denying the individual defendants' third party standing were not raised. For instance, courts generally hold a presumption against third party standing, especially when there has been no express agreement between the contracting parties to benefit the third party.[121] "A party cannot establish third party beneficiary status unless he or she carries the burden of proving that the contracting parties' intended purpose in executing their agreement was to confer a direct benefit on the alleged third party beneficiary."[122] In California, the intent to benefit the third party need not be manifested by the promisor; it is sufficient that the intent is understood between the parties.[123] Neither is it necessary that the contract identify or refer to the third party beneficiary by name; the beneficiary may recover[124] if he or she can show that it was intended that he or she be benefited by the contract.[125] However, California courts do require at least that the promisor have reason to know of the promisee's intent to benefit a third party.[126]

117. *Complaint*, *supra* note 2, at 3-5.

118. *See, e.g.*, *Complaint*, *supra* note 2.

119. *See Answer*, *supra* note 89, at 2.

120. *Dryer*, 709 P.2d at 834.

121. Harry G. Prince, *Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts*, 25 B.C. L. REV. 919, 926 (1984).

122. Alling v. Universal Mfg. Corp., 7 Cal. Rptr. 2d 718, 735-36 (Ct. App. 1992)(finding, in part, that a corporation not in existence at the time the contract was made could not be a third party beneficiary to the arbitration clause therein).

123. *Id.* at 736.

124. Here, the potential beneficiaries of the employment contract did not wish to recover any claim. Instead, they wanted to use the protection of the arbitration clause between Munshaw and 24 Hour Fitness to avoid a lawsuit. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539.

125. *Alling*, 7 Cal. Rptr. 2d at 736.

126. Prince, *supra* note 121, at 931.

But because the court accepted Munshaw's allegations regarding third party beneficiary status for the individual defendants as fact, it did not analyze the parties' intent when making their contract for employment.[127] Munshaw was never able to argue that she did not have reason to know that her co-workers would be third party beneficiaries. Employees have traditionally been unsuccessful in claiming third party standing on their employers' contracts.[128] Even when the potential benefit of the contract would be substantial, courts have based their decisions on the fact that the contract was primarily made to benefit the employer.[129] Clearly, these types of arguments could have furthered Munshaw's cause and her lawyers failed her by not making them.

C. The Ultimate Unconscionability of This Mandatory Arbitration Clause

Munshaw claimed that her employment contract was an unconscionable contract of adhesion. Indeed, the type of contract signed by Munshaw is typically considered a contract of adhesion. Contracts of adhesion are standardized contracts which are drafted by the party with superior bargaining strength and submitted on a "take it or leave it" basis.[130] Generally, these types of contracts are fully enforceable against the weaker party.[131] However, the contract is unenforceable if "it is unconscionable and does not fall within the reasonable expectations of the weaker or 'adhering' party."[132]

The court in *24 Hour Fitness* reviewed the criteria for unconscionability of an arbitration clause, but did not give the facts of this case a full review.[133] Both a procedural and a substantive element must be present to render a contract invalid for unconscionability.[134] Procedural unconscionability focuses on the oppressive nature arising from an inequality of bargaining power and a lack of meaningful choice in the terms of the contract,[135] as well as the extent to which the disputed terms were "hidden" within the printed form.[136] California courts have had trouble evaluating substantive

127. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 539.
128. Prince, *supra* note 121, at 948.
129. *Id.* at 949.
130. Howard, *supra* note 21, at 266-67.
131. *Id.* at 267.
132. Armendariz v. Found. Health Psychcare Servs., Inc., 80 Cal. Rptr. 2d 255, 263 (Ct. App. 1998).
133. *See 24 Hour Fitness*, 78 Cal. Rptr. 2d at 540-41.
134. *Id.* at 540.
135. Stirlen v. Supercuts Inc., 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1992).
136. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 540-41.

unconscionability, but have generally focused on one-sided or overly harsh results.[137] One court, observing that contracts consist of allocation of risks, concluded that a term within a contract is suspect when it "reallocates the risks of the bargain in an objectively unreasonable or unexpected manner."[138] "The greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated."[139] However, the *24 Hour Fitness* court chose to revert to the "traditional" definition of substantive unconscionability: terms so harsh or oppressive as to "shock the conscience."[140]

With these elements in mind, the court of appeal rejected Munshaw's unconscionability claims.[141] Even assuming that procedural unconscionability was present, the court found that Munshaw had not shown any reason that the terms of the agreement were harsh or oppressive.[142] The court compared the contract between Munshaw and 24 Hour Fitness to the arbitration clause sought to be enforced in *Stirlen v. Supercuts*.[143] In *Stirlen*, the terms of the arbitration clause were found to be oppressively one-sided because they limited the employees' rights in the arbitration process while retaining those rights for the employer.[144] Because Munshaw and 24 Hour Fitness shared equal rights under their arbitration clause, the court found there was no substantive unconscionability.[145]

Here, the court should have applied the broader standard for determining substantive unconscionability used in *A&M Produce Co.*,[146] and compared the inequality in bargaining power to the risks allocated by the contract. When the employee signs away her right to settle in court a claim arising from her employment contract, she has taken on a serious risk. The inequality in bargaining power, acknowledged by the court,[147] would carry more weight under this standard. The heightened standard would require the court to look at more than just the question whether both sides received the same rights under the arbitration clause. Because 24 Hour Fitness drafted

137. *See Stirlen*, 60 Cal. Rptr. 2d at 145.
138. A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 122 (Ct. App. 1982).
139. *Id.*
140. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 541.
141. *Id.*
142. *Id.*
143. *See id.*
144. *Stirlen*, 60 Cal. Rptr. 2d at 151.
145. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 541.
146. *See* A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 122 (Ct. App. 1982).
147. *24 Hour Fitness*, 78 Cal. Rptr. 2d at 541.

the contract, they knew more about the terms of the clause than did Munshaw. They knew it could apply to her fellow employees; they knew it would protect them against her FEHA claims. Munshaw merely knew that she needed to sign these documents in order to get her paycheck.[148] The inclusion of fellow employees as third party beneficiaries and the possibility that she would end up without any forum for her dispute significantly shifted the risk to Munshaw and were clearly beyond her reasonable expectations from the language of the contract.

III. Should Workers Be Forced To Waive Their Civil Rights By Signing Mandatory Arbitration Clauses?

The facts in *24 Hour Fitness* are as moving as the result is unjust. Not only was this plaintiff (allegedly, of course) subjected to the extremely vile behavior of her fellow employees and supervisors, she then met with more harassment and a cold shoulder when she turned to the company for help. After leaving work under a constructive discharge, she had the misfortune of hiring several attorneys who appear to have a made a mess out of the most promising aspects of her case. The glimmer of hope offered by the trial court's denial of defendants' motion for summary judgment is dashed by the one-two punch delivered by the court of appeal—first overruling the trial court, then finding that plaintiff had also waived her right to arbitration. As if things could get any worse, the case was dismissed even as to the individual defendants based on facts alleged in Munshaw's complaint! Sierra Munshaw's trip through the workplace and the court system left her with a list of wrongs and not a single remedy.

The implications of *24 Hour Fitness* ring in a dark hour for victims of employment discrimination. Frequently, at-will employees will be unaware that they have signed an arbitration agreement as a term of their employment until that fact arises as a defense to their complaint against their employer. By that time, an employee's behavior in attempting to litigate her claim on the merits may be construed by the court as an implicit waiver of his rights under that contract. The result will be that the employer is neither responsible to defend in court nor participate in the contractual arbitration. This is clearly advantageous to a defendant corporation, and devastating to the interests of an employee. Another result of *24 Hour Fitness* may

148. *See id.* at 544.

be that employees who have signed arbitration agreements under questionable circumstances, or with borderline-unconscionable terms, will be completely discouraged from attempting to determine the viability of the agreement in a courtroom. This result works to the advantage of the corporation, who already had the ultimate benefit of being the party with superior power and the drafter of the mandatory terms of the contract.

These concerns become especially poignant in light of the *24 Hour Fitness* court's ruling on third party beneficiaries to a mandatory arbitration agreement between employer and employee. Even assuming that the employee read, understood, and agreed to the terms of an arbitration clause, there is no reason to impute knowledge of the law of agency to a layperson employee. Unless the arbitration agreement specifically states that fellow employees will have access to the same right to compel arbitration as the employer, the employee-signatory does not know that other employees will be the beneficiaries of this contract. It is particularly repugnant, therefore, to bar plaintiff's remedies against those fellow employees through summary judgment and an implied—or even explicit—waiver of a right to arbitrate against the employer.

The result of this case illustrates a clear example of the need for change in cases involving mandatory arbitration clauses in employment contracts. If the legislature were to take action, it could clarify its intent regarding the relationship between arbitration clauses and civil rights protections under FEHA. Employers could be forced to endure stricter scrutiny when including arbitration clauses in boilerplate employment contracts.[149]

Alternatively, the legislature could change the system for everyone's benefit by engaging in an overhaul of the current arbitration system. One approach would be to conceive of the arbitrator as an "independent investigator" whose role in the proceedings would be more akin to the judge under the civil law system of courts. The investigator would conduct her own discovery into the facts and have an increased ability to question the parties and other witnesses. Finally, the investigator would ultimately produce an

149. The California Supreme Court recently clarified the elements essential to a valid pre-dispute arbitration clause, when the arbitration clause includes statutory claims. It must provide for neutral arbitrators, provide for more than minimal discovery, require a written opinion allowing appellate review, allow all types of relief that would be available in court, and not require employees to pay either unreasonable costs or any arbitrators' fees or expenses. *See generally* Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669 (Cal. 2000).

opinion that was subject to a broader scope of review than the current standard governing arbitration review. This plan could have the potential of curing several disadvantages frequently cited about the current state of arbitration. Without affecting the benefits of the present arbitration system—its speed and cost-effectiveness—a new system could increase the attractiveness of arbitration to plaintiffs by providing for more discovery as well as producing an opinion subject to review. By adding some of the safeguards present in litigation, plaintiffs will be more likely to achieve just results from arbitration. The overall attractiveness of arbitration as an alternative to litigation will be apparent to both plaintiffs and defendants, thus making mandatory arbitration clauses less burdensome to plaintiffs.

Another solution lies with the California courts: *24 Hour Fitness* would have had a different result if the court had adopted the broader standard of review for an unconscionability claim.[150] Especially if cases disputing arbitration clauses are to be thrown out on summary judgment and deemed unarbitrable due to a plaintiff's waiver, unconscionability is an argument of last resort for the plaintiff and should accordingly be granted some additional deference by the courts. Boilerplate employment contracts—signed as a "condition of employment" by legally naive employees—are a fertile breeding ground for genuine claims of unconscionability. Plaintiffs in litigation as a result of these contracts should receive the benefit of the doubt, in the form of California's broader standard of review.

The future of avoiding both litigation and arbitration of employment discrimination claims looks rosy for employers in California right now. However, the alternative of *Duffield* or prohibitive legislation is a real enough possibility that potential defendants would do well to embrace a middle ground promoting plaintiffs rights in civil rights' cases while still protecting the freedom of contracting parties.[151] The statutory right to be free from employment discrimination is the most obvious arena to scrutinize any means by which an employer gains more power over its

150. *See supra* Part II, section C.

151. Although the facts are only somewhat related, the Supreme Court may shed some light on the subject of pre-dispute employment clauses when it decides Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), *cert. granted,* 146 L. Ed. 2d 955 (2000). This case involves an employee bringing suit in federal court alleging sexual harassment, discrimination and constructive discharge. The district court granted Circuit City's motion to compel arbitration, but the Ninth Circuit reversed, finding that employment disputes did not fall under the Federal Arbitration Act. *Id.* at 1071-72. Although the F.A.A. is not at issue in *24 Hour Fitness*, the Court might nevertheless clarify some of the issues addressed in this Note.

employees. Implicit and explicit in the text and legislative history of FEHA is the need to protect employees from the misuse of an employer's superior power, even where intent to prohibit mandatory arbitration clauses cannot be inferred.

It is essential to create reliable standards wherein the terms of a contract are enforced and the reasonable expectations of a contracting party are protected. However, an equally essential outcome is to assure equitable results for employees signing arbitration agreements. A valid arbitration agreement should be upheld by the court, but the validity of those agreements should remain an issue for the courts to decide, without requiring plaintiffs to make an all-or-nothing choice to find a remedy for their wrong.

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